Supreme Court, U.S.
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No. 05-1529

In The

Supreme Court of the United States

NORAH THURMAN,

Petitioner,

v.

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,

Respondents.

On Petition For A Writ Of Certiorari To The State Of Louisiana Court Of Appeal, First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the Louisiana court decided an important question of law in a way that conflicts with relevant decisions of this Court, particularly *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) and *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), and the decision of the federal district court in *Auburn Univ. v. The Southern Assoc. Of Colleges and Schools, Inc.*, C.A. No. 1:01-CV-1069-JOF (N.D.Ga. Jan. 2002)?

2. Did the Louisiana court err in deciding that the previous grant of summary judgment to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU") foreclosed Ms. Thurman's lawsuit against the individual faculty member defendants for due process violations and defamation, thereby compounding the denial of due process to Ms. Thurman?

LIST OF ALL PARTIES

1. Norah Thurman, plaintiff-petitioner.
2. The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, defendant.
3. Paul Hoffman, defendant-respondent.
4. James West, defendant-respondent.
5. Jana Oetting, defendant-respondent.
6. Jan Norris, defendant-respondent.
7. Hugh Buckingham, defendant-respondent.
8. John Larkin, defendant-respondent.

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OPINIONS BELOW

Ms. Thurman filed suit in Louisiana state court on November 15, 1999, against the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU), alleging denial of due process in connection with her dismissal from a Ph.D. program. The state district court denied LSU's motion for summary judgment. LSU applied for supervisory writs to the Louisiana Court of Appeal, First Circuit, which granted the writ and reversed the district court on July 15, 2002, granting LSU's motion for summary judgment and dismissing Ms. Thurman's claims against it. Ms. Thurman applied for writs to the Louisiana Supreme Court, which denied the writ application on November 8, 2002. Ms. Thurman filed an application for a writ of certiorari with the Supreme Court of the United States, which denied the application. Along the way, Ms. Thurman amended her lawsuit to include the individual defendants, faculty members and administrators employed by LSU. The individual defendants moved for summary judgment, which the district court granted on January 27, 2004. Ms. Thurman appealed to the Louisiana First Circuit on March 12, 2004. The First Circuit initially dismissed the appeal but then reversed itself on Ms. Thurman's application for rehearing. Then, on October 26, 2005, the court of appeals affirmed the district court's judgment. Ms. Thurman applied for writs to the Louisiana Supreme Court, which denied the writ application on March 17, 2006.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered on October 26, 2005, by the Louisiana Court of Appeal, First

Circuit; the Louisiana Supreme Court denied discretionary review by order dated March 17, 2006. This Court has jurisdiction to review the judgment on a writ of certiorari pursuant to 28 U.S.C. 1257.

RELEVANT CONSTITUTIONAL PROVISIONS

No person shall be deprived of life, liberty, or property, except by due process of law.

Louisiana Constitution, article 1, section 2.

No state shall . . . deprive any person of life, liberty, or property, without due process of law.

Constitution of the United States, Amendment XIV, section 1.

STATEMENT OF THE CASE

A. The Advisory Committee and the Dissertation Defense.

Norah Thurman entered LSU's graduate school in the fall semester 1991. She was accepted into the doctoral program in the Department of Communication Sciences and Disorders in the spring semester 1992. At all relevant times, her advisory committee was composed of Jan Norris, Janna Oetting, Hugh Buckingham, Paul Hoffman (Ms. Thurman's major professor and chair of her advisory committee), and James West (from outside the department). LSU's Graduate Bulletin provides that **"[d]uring the entire period of work toward the doctorate, the student's program is directed by a special advisory committee."**

Ms. Thurman met with Hoffman, her major professor, about once a month while preparing her dissertation. Ms. Thurman would submit drafts of her dissertation to Hoffman, who would then edit the submissions and propose areas for further research. Hoffman also reviewed and approved the prospectus, and provided guidance to Ms. Thurman in terms of what to include in the dissertation and how to do the statistical analysis. Hoffman testified in deposition that he was the director of Ms. Thurman's dissertation, and that as such he would look at the work and try to make sure that it was headed in the right direction.

In February 1997, Ms. Thurman was to take her final examination, which was an oral defense before her graduate advisory committee. The committee decided not to accept Ms. Thurman's dissertation as written as her final examination but to require Ms. Thurman to revise her dissertation and be re-examined before summer 1999. Ms. Thurman was assigned a grade of "U" for the spring 1997 semester. According to Hoffman, a revision of a doctoral dissertation is required after most oral defenses, and the student is always assisted by the advisory committee during the re-write.

B. The Requirement of an "Independent Revision."

In Ms. Thurman's case, however, her advisory committee required her to conduct an "independent" revision, without any guidance or direction from her committee during the period of revising her dissertation. The ostensible reason for requiring Ms. Thurman to conduct an independent revision was due to the "numerous substantive problems" with the dissertation.

The "independent revision" requirement is directly contrary to the LSU Graduate Bulletin, which states that "[d]uring the entire period of work toward the doctorate, the student's program is directed by a special advisory committee." Hoffman testified that the advisory committee typically continues to work with the student and direct the dissertation and provide guidance during the revision process, and that never in his experience has any student other than Ms. Thurman been required to conduct an independent revision. Another member of Ms. Thurman's advisory committee, James West, testified that he had never before seen or heard of a requirement that a student conduct an independent revision. Similarly, John Larkin, the interim dean of the graduate school at relevant times, testified that he has never seen an independent revision requirement other than in Ms. Thurman's case.

Ms. Thurman met with the interim dean of the graduate school, John Larkin, on March 12, 1997, to discuss her concerns about the handling of her dissertation. She wrote to Larkin on August 5, 1997 to express her concerns about the apparent bias of her committee against her, to question the committee's motives, and to complain about the unprecedented requirements being imposed on her.

Ms. Thurman revised her dissertation without any access to and without any guidance or input from her advisory committee. She submitted the revised dissertation in October 1997 and received a grade of "S" for the fall 1997 semester.

C. The Alleged Vote to Fail the Dissertation and the Reckless Accusation.

According to LSU, the committee allegedly met in January 1998. Apparently no one knows the date of this alleged meeting. Ms. Thurman was not invited to attend, another unprecedented procedural irregularity. At that meeting, the committee allegedly voted to fail Ms. Thurman's dissertation; there are no records or notes of this meeting. Ms. Thurman suspects that the committee's decision to fail her dissertation was motivated wholly or in substantial part by retaliation for Ms. Thurman's having gone to Larkin to complain about the unfair and unusual requirement that she conduct an independent revision.

Hoffman testified that, other than Ms. Thurman, he has not been involved in any situations where a dissertation failed.

Hoffman wrote to Ms. Thurman on January 28, 1998, advising Ms. Thurman of the committee's decision to fail her dissertation. Most startling in Hoffman's letter is his reckless and false allegation that the "most severe problem with the document involved a breech [sic] of academic integrity with regard to the conduct of the study and its reporting." LSU failed to follow its own policies and procedures regarding this damaging allegation. LSU Policy Statement PS-69 provides detailed procedures for immediately reporting and investigating allegations of misconduct in research. It specifically provides that if the investigation fails to substantiate the charges, LSU "will undertake reasonable efforts to restore the respondent's reputation." Ms. Thurman was never informed of any investigation as required by PS-69 and federal law. There was certainly no effort made to restore Ms. Thurman's

reputation. LSU denied Ms. Thurman due process in connection with this reckless, unsubstantiated, and harmful allegation.

D. The First Appeal and the Larkin Agreement.

Interim Dean Larkin wrote to Ms. Thurman on March 17, 1998, forwarding the forms under LSU Policy Statement PS-48.03 (required by federal law) for a grade appeal. Larkin's letter stated that steps 1 and 2 (which would have involved Hoffman) would not need to be followed, and in his deposition he testified that this was because by that time the relationship between Ms. Thurman and Hoffman "had dissipated to the point that I did not think it would be fair to make her go back there unless she wanted to."

On August 20, 1998, Ms. Thurman submitted the Student Appeal Form, including a detailed Statement of Appeal. Larkin acknowledged receipt of the appeal by letter dated September 1, 1998. PS-48.03 at that time required that "the dean or other administrator must make his decision within 30 days of receipt of the student's appeal." Larkin wrote Ms. Thurman on November 6, 1998, that "the normal 30 day period to resolve you [sic] case cannot be adhered to." Ms. Thurman followed all procedures for an appeal, but LSU did not.

Ms. Thurman questioned her committee's apparent bias and motivation. Larkin suggested that outside reviewers be brought in. Ms. Thurman identified Tashakkori and Wandersee as being professors "who might be able to put some input into" her dissertation.

On December 22, 1998, Larkin wrote to Ms. Thurman to advise her as follows:

> **I have completed a thorough investigation of your grade appeal in COMD 9000 and have reached the following decisions. Your grade for COMD 9000 for the spring semester of 1998 will be changed from a U to a S and you will be given a chance to rewrite and defend your dissertation before a new committee during the upcoming spring semester.**
>
> **I am appointing Dr. Tashakkori from ELRC and Dr. Wandersee from EDCI to read your dissertation and provide a critique that will provide you with the guidance you will need for any necessary revisions of your dissertation document. When any revisions are completed you will be allowed to defend your dissertation with a new committee.**

(This letter is in the record). Larkin proposes a new, superseding agreement, and promises that Ms. Thurman will receive a critique that will provide guidance for any necessary revisions, and that when any revisions are completed, she will be allowed to defend her dissertation with a new committee. If these promises had been met, Ms. Thurman would not be in court now. Unfortunately, however, LSU failed to keep the promises set forth in Larkin's December 22, 1998, letter.

E. The Findings of Tashakkori and Wandersee.

After reviewing the dissertation, both Tashakkori and Wandersee expressed concerns about the **design** of the study. The **design** of the study was of course approved and in fact directed by Ms. Thurman's advisory committee. The

allegedly fatal flaws identified by Tashakkori and Wandersee were problems that Ms. Thurman's advisory committee either negligently failed to prevent or affirmatively directed.

For example, both Tashakkori and Wandersee criticized Ms. Thurman's use of parametric statistical analysis (as distinguished from nonparametric analysis) in her dissertation. But the fact is that Hoffman specifically recommended that Ms. Thurman use parametric analysis.

The advisory committee approved the design of the study in Ms. Thurman's prospectus, and in Ms. Thurman's oral defense in February 1997 there was no suggestion that the dissertation had fatal flaws in its design. Instead, Ms. Thurman's advisory committee felt that it would have been possible to correct whatever flaws were identified.

F. Larkin's Startling About-face.

More than a month after receiving Tashakkori and Wandersee's memoranda, and having received no indication from LSU that it would follow Larkin's December 22 letter, Ms. Thurman wrote to Larkin on March 14, 1999, proposing to revise her dissertation to address their concerns. Larkin's response of April 7, 1999, is astonishing. His letter to Ms. Thurman states, "You told me in no uncertain terms in our last meeting that you would not make any changes to your document." This statement is obviously and palpably false, as a quick review of Larkin's December 22, 1998, letter to Ms. Thurman and his January 6, 1999, letter to Tashakkori and Wandersee makes clear. These letters (all of which are in the record) discuss practically nothing but the proposition that Ms. Thurman would revise her dissertation with guidance from Tashakkori

and Wandersee and under the direction of a new advisory committee that Larkin would appoint.

Larkin's April 7, 1999, letter to Ms. Thurman went on to advise her that April 10 at noon was the "final date for turning in an acceptable dissertation, and I do not see how you could make the appropriate changes, defend them before a committee, and make any subsequent revisions within that time. Thus, it appears likely that you will receive a U in research again this semester. If this occurs, you may, of course, file an appeal of the grade as you did in the past." It is unclear exactly who assigned Ms. Thurman the grade of "U" for the spring semester, because there was no committee in place. Under LSU policy, an advisory committee is the only entity charged with advising, directing, and evaluating a doctoral student's progress.

G. The Second Appeal.

In response to this, Ms. Thurman on April 13, 1999, wrote to LSU Chancellor William Jenkins. She advised that she had revised her dissertation to address the concerns expressed by Tashakkori and Wandersee, and she invited Jenkins to contact her to discuss means by which to resolve the situation. At this point, there was no one to whom Ms. Thurman could submit her revised dissertation, as no committee had been appointed for her.

In fact, LSU responded on May 11, 1999, discussing the appointment of a new committee to be composed of "four faculty members appointed by Dr. Larkin." This letter states that LSU considered Ms. Thurman's April 13 letter as an appeal. In her May 24, 1999, letter, Ms. Thurman expressly asks to whom she should send her revised dissertation. She never received an answer. LSU

failed to follow its established appeal procedures in connection with this appeal by Ms. Thurman.

H. The Seven-Year Time Limit.

Larkin wrote to Ms. Thurman on June 4, 1999, advising her that her seven-year deadline to complete her program lapsed with the completion of the spring 1999 semester. The Graduate Bulletin states that an extension of this time limit may be obtained "by special permission of the dean of the Graduate School." LSU's letters of May 11 and June 4 state that such extensions are granted in one-year increments.

Ms. Thurman's seven-year time limit had actually lapsed at the conclusion of the fall 1998 semester, and the interim dean of the Graduate School, Larkin, had granted Ms. Thurman an extension of her time limit in his December 22, 1998, letter. This one-year extension would not expire until the end of the fall 1999 semester. Accordingly, Ms. Thurman was **not** required to seek an extension from the dean of the Graduate School at the conclusion of the spring 1999 semester; she already had an extension until the end of the fall 1999 semester.

ARGUMENT FOR ALLOWANCE OF WRIT

A. The Louisiana court has decided an important question of law in a way that conflicts with relevant decisions of this Court.

The case at bar is not to determine whether Ms. Thurman should pass or fail. Rather, it is to determine whether the administration and faculty of LSU followed

the applicable rules and procedures required by federal education laws in connection with a student's academic career.

In this case, the Louisiana Court of Appeal, First Circuit, relied on its previous ruling (dated July 15, 2002, attached as an exhibit) in which it granted the Board of Supervisors' writ and reversed the trial court's denial of the Board of Supervisors' motion for summary judgment, and specifically that portion reading, "Plaintiff cannot demonstrate in the case at bar that relator and/or its faculty substantially departed from accepted academic norms and did not exercise professional judgment." This quote is a reference to the test set forth in *Regents of University of Michigan v. Ewing*, 106 S.Ct. 507, 474 U.S. 214, 80 L.Ed.2d 523 (1985). The reasoning of that previous ruling by the First Circuit was itself flawed, as demonstrated below, and it was error for the First Circuit to rely on it in reference to the administration and faculty.

A good starting point in analyzing due process in the academic context is *Board of Curators of University of Missouri v. Horowitz*, 98 S.Ct. 948, 435 U.S. 78, 55 L.Ed.2d 124 (1978), which is the only other case cited by the First Circuit in its previous opinion regarding the Board of Supervisors. The state courts have misapplied and twisted these Supreme Court precedents beyond recognition. A proper analysis of this Court's precedent and other relevant federal decisions reveals that the Louisiana courts were wrong in granting summary judgment both to the Board of Supervisors and to the administration and faculty. It has been clearly established that there must be a clear distinction in responsibilities between the board of supervisors of an institution and the administration and faculty. See *Auburn Univ. v. Southern Assoc. of Colleges*

and Schools, Inc., Civil Action No. 1:01-CV-2069-JOF (N.D.Ga. Jan. 2002).

1. *Board of Curators, University of Missouri v. Horowitz*, 98 S.Ct. 948, 435 U.S. 78, 559 L.Ed.2d 124 (1978).

In *Horowitz*, this Court concerned itself primarily with procedural, as distinguished from substantive, due process. The case involved a medical school student who was dismissed by the school for failure to meet academic standards. In holding that the student had received procedural due process, this Court stated:

> The school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment.

435 U.S. 78, 85.

The First Circuit in its previous ruling missed half the test (the second sentence in the above quote). The First Circuit stated that in *Horowitz*, "a student dismissed for academic reasons is not entitled to a hearing before the decisionmaker, but the student must only receive notice of the school's dissatisfaction with his or her academic performance and with the threat of possible dismissal. In the case at bar, plaintiff received such notice." In fact, *Horowitz* requires more than mere notice to satisfy due process, as in *Horowitz*, an integral part of the equation was its finding that **"The ultimate decision to dismiss**

respondent was careful and deliberate." 435 U.S. at 85. The First Circuit did not find that the ultimate decision to dismiss Ms. Thurman was careful and deliberate, but only that she received notice of LSU's dissatisfaction with her performance and the threat of possible dismissal. This finding of notice alone is insufficient to demonstrate that procedural due process was afforded.

The *Horowitz* Court devoted one paragraph and two footnotes to discussion of substantive due process. It assumed without deciding that substantive due process meant preventing arbitrary or capricious academic dismissals by state institutions, but it found that no showing of arbitrariness or capriciousness had been made in the case before it. Relevant to this issue was the Court's finding that, despite Ms. Horowitz's claim that the university failed to follow its own rules, in fact "the school followed its established rules," except where it designed new rules in an effort to further protect her. See 435 U.S. at 92, fn. 8. In the case at bar, the Board of Supervisors and the individual defendants failed to follow the university's established rules and policies in several respects, including most importantly **the withdrawal of her advisory committee** and **the failure to appoint a new advisory committee as promised**. These rule violations, and the resulting arbitrary or capricious conduct, establish that Ms. Thurman's substantive due process rights were violated.

No court has directly addressed the individual defendants' rule violations or the resulting arbitrary and capricious conduct, but the First Circuit previously addressed other rule violations by the Board of Supervisors, stating that LSU's failure to follow its procedures regarding its allegations that Ms. Thurman had committed a "breach of

academic integrity" was "not the basis upon which plaintiff's dissertation was failed," a finding which is not supported by the record; and that LSU's failure to follow its appeal procedures was "to accommodate plaintiff," another finding not supported by the record. In fact, after a "thorough review" of Ms. Thurman's student appeal, acting Dean Larkin dismissed Ms. Thurman's graduate committee, reinstated Ms. Thurman to good standing, and confirmed in writing his promise to appoint a new graduate committee for Ms. Thurman. Ms. Thurman agreed to Dean Larkin's proposal and the time limit imposed by the agreement, but Dean Larkin broke his promise to appoint a new committee.

It cannot be doubted that LSU and the individual defendants departed substantially from their own established rules and policies in many different respects in their handling of Ms. Thurman's academic studies. Nor can it be doubted that an important justification for the judicial reluctance to impose stringent procedural requirements in the purely academic context is the notion that schools have a consistent framework for academic evaluations and this framework should be preserved. See *Horowitz*, 435 U.S. 78, 86, fn. 3, reading in part, "We conclude that considering all relevant factors, including the evaluative nature of the inquiry and **the significant and historically supported interest of the school in preserving its present framework for academic evaluations**, a hearing is not required by the Due Process Clause of the Fourteenth Amendment." (Emphasis added). The Court's consideration is without application where, as here, the school fails to follow its "framework for academic evaluations." The school has no "significant and historically supported interest" in preserving *ad hoc* policies that faculty members make up as they go along and apply to

only one student. Nor is the University of Missouri's grading policy the same as the LSU graduate school grading policy.

2. *Regents of University of Michigan v. Ewing*, 106 S.Ct. 507, 474 U.S. 214, 80 L.Ed.2d 523 (1985).

Ewing was a substantive due process case. This Court assumed without deciding that Ewing had a property interest giving rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, but found no such action in the record. Again, as with *Horowitz*, the First Circuit's previous ruling cites and relies on an incomplete version of this Court's holding.

What the *Ewing* Court stated is as follows:

> The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

474 U.S. 214, 225.

In its previous ruling, the First Circuit quoted the second and third sentences from the above quote, but

failed to make the finding that the first sentence makes necessary. When the *Ewing* Court refers to "a genuinely academic decision, such as this one," they mean a decision **"made conscientiously and with careful deliberation, based on an evaluation of the entirety of [the student's] academic career."** In other words, before it is appropriate to accord the faculty's decision the sort of deference outlined in *Ewing*, the Court must find that the record demonstrates the faculty's decision was the result of a conscientious, careful deliberation, based on an evaluation of the student's whole academic career. Such a finding is the trigger for the application of the *Ewing* standard, and no court has ever made such a finding in this case. Even under the *Ewing* standard, however, Ms. Thurman shows substantial departures from accepted academic norms that demonstrate that the administration and faculty did not actually exercise professional judgment.

3. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

Moreover, the facts clearly demonstrate that in the case at bar, professional judgment, as meant by the *Ewing* Court, was not exercised. In setting forth its "substantial departure from accepted academic norms" standard, the *Ewing* Court provided a citation to *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). *Youngberg* involved a lawsuit brought by the mother of a mentally retarded individual who was involuntarily committed to a Pennsylvania state institution over injuries suffered by her son. The Court held that the young man had due process rights, and that a determination of whether his due process rights had been violated involved balancing his liberty interests against the relevant state interests. The Court held that

the proper standard for determining whether the State has adequately protected such rights is whether professional judgment in fact was exercised; the courts must show deference to the judgment exercised by a qualified professional, whose decision is presumptively valid.

Specifically, the Court stated: " . . . [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323. In a footnote, the Court explained, "By 'professional' decisionmaker, we mean a person competent, whether by education, training, or experience, to make the particular decision at issue." (*Youngberg*, footnote 30). In Ms. Thurman's case, there was no such professional decisionmaker. It is difficult to identify who the decisionmaker was, in the first place, because the only candidates do not meet the Court's definition of "professional" decisionmaker with reference to Ms. Thurman's pursuit of a doctorate.

In fact, despite the requirements of LSU's graduate catalog and acting Dean Larkin's letter promising appointment of a new committee as in *Horowitz*, Larkin never appointed a new graduate committee for Ms. Thurman. The graduate committee (composed of acknowledged "professional decisionmakers") assigns grades for the graduate student, but here no graduate committee was appointed. There was therefore no committee to assign the second and fatal "U" that resulted in Ms. Thurman's dismissal. The administration and faculty would have the Court believe that Ms. Thurman failed to appoint her own committee but this was not her responsibility, according to

LSU's published rules and procedures. And obviously a student is not qualified by experience, training, or education to determine a professional decisionmaker.

The question is, who was the "professional decisionmaker" who assigned the second and fatal "U?" Perhaps it was Dean Larkin himself. The Board of Supervisors has already told us that Dean Larkin is not a professional in this area. At page 5 of its application for supervisory writs filed in the First Circuit on March 21, 2002, the Board of Supervisors implies that Ms. Thurman was unreasonable because "she was now proposing that Dean Larkin, a man with no training whatsoever in communication sciences and disorders, assign a grade to the document." So by LSU's admission Larkin is not competent by education, training, or experience to the make the decision at issue, and he is therefore not a "professional" under the *Youngberg-Ewing* standard, and due process has been denied.

Or perhaps Dean Larkin and the other defendants will pass the buck to the last two professors who reviewed Ms. Thurman's dissertation: Tashakkori and Wandersee. Again, neither of these gentlemen is a professional under the relevant standard of this Court. Tashakkori, for example, states in his review of Ms. Thurman's dissertation, "Since I am not familiar with the specific discipline of the study, I am unable to provide any further advice regarding this [use of statistics]." As he is not familiar with the specific discipline, Tashakkori is not competent by education, training, or experience to make the decision at issue. Neither is Wandersee. In his report he states, "I am not a member of the Ph.D. candidate's department, have had no contact with that department during my decade of service at LSU, am not an expert in communication disorders, and have not met or communicated with

the candidate." Clearly, Wandersee is not a professional with regard to Ms. Thurman's dissertation.

As there were no professional decisionmakers, Ms. Thurman's due process rights with regard to her academic career were denied. See *Ewing* and *Youngberg*.

B. The Louisiana court erred in deciding that the previous grant of summary judgment to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU") foreclosed Ms. Thurman's lawsuit against the individual faculty member defendants for due process violations and defamation, thereby compounding the denial of due process to Ms. Thurman.

1. The First Circuit's Decision Was Based On Dicta Regarding Questions Not Presented In Previous Ruling.

The First Circuit previously reversed the trial court's denial of summary judgment to the Board of Supervisors. At that time, the First Circuit was not called on to decide Ms. Thurman's claims against individual administrators and faculty members and did not decide those claims previously. See ruling below at p.6, acknowledging that "the individual defendants were not specifically named as parties to the action at that time." The First Circuit in its previous ruling expressed in *dicta* its opinion on a matter not before it when it stated that Ms. Thurman "cannot demonstrate" that LSU's faculty failed the *Ewing* test. The fact is that Ms. Thurman had not had any opportunity to be heard on the issue. The First Circuit's language acknowledges as much, by using the words, "cannot demonstrate," rather than "has not demonstrated. . . ." The First

Circuit recklessly made its statement without the benefit of Ms. Thurman's legal arguments, and based on its misunderstanding of *Horowitz* and *Ewing* (as discussed above), and without any appreciation of the legally required distinction between the policy-making functions of the Board of Supervisors (whose liability it was deciding) and the administration/implementation functions of the faculty and administrators (whose liability was not before it), as discussed below.

2. The First Circuit Incorrectly Applied The "Law Of The Case" Doctrine.

In the case at bar, the First Circuit incorrectly held that the state "law of the case" doctrine dictated the conclusion that its previous ruling in favor of LSU foreclosed Ms. Thurman's claims against the individual defendants.

The court of appeals cited *Louisiana Land and Exploration Co. v. Verdin*, 95-2579, pp.3-4 (La.App. 1 Cir. 9/27/96), 681 So.2d 63, 65, *writ denied*, 96-2629 (La. 12/13/96), 692 So.2d 1067, *cert. denied*, 520 U.S. 1212, 117 S.Ct. 1696, 137 L.Ed.2d 822 (1997), for the propositions that: the law of the case principle is a discretionary guide which relates to the rule that an appellate court ordinarily will not reconsider its own **rulings of law** on a subsequent appeal in the same case; the reasons for the "law of the case" doctrine are to avoid relitigation of the **same issue**, to promote consistency of result in the same litigation, and to promote efficiency and fairness to both parties by affording a **single opportunity for the argument and decision of the matter at issue**; and that when an appellate court considers arguments made in supervisory writ applications or responses to such applications, the

court's **disposition on the issue considered** usually becomes the law of the case, foreclosing relitigation of **that issue** either at the trial court on remand or in the appellate court on a later appeal. (Ct.App. Ruling at p.5) (emphasis supplied).

In the case at bar, the First Circuit made no "rulings of law" in its previous ruling in favor of the Board of Supervisors that in any way could have implicated Ms. Thurman's rights or claims against the individual defendants. Such claims were not before the court. The First Circuit's ruling could not possibly have been completely dispositive of Ms. Thurman's claims against the individual defendants and the doctrine of "law of the case" by its terms does not apply here.

There was no "disposition on the issue" raised by Ms. Thurman in her claims against the individual defendants, as the "issue considered" previously was only Ms. Thurman's claims against the Board of Supervisors. The doctrine's purpose is to afford "a single opportunity for argument and decision of the matter at issue." But on the matter of Ms. Thurman's claims against the individual defendants, she has had **no opportunity for argument and decision**, because the district court and the appellate court have improperly relied on the law of the case doctrine and refused to reach the merits of her claims.

3. The First Circuit Improperly Affirmed Summary Judgment Based On Identical Facts Applied to Separate Entities With Different Functions As A Matter of Federal Law.

The First Circuit has framed the issue broadly so as to support its statement that Ms. Thurman's claims against

the Board of Supervisors are "identical" to her claims against the individual defendants, see Ruling, p.5-6, and relies on the fact that Ms. Thurman's claims against all parties arise from the same facts (Ruling, p.6). In fact, however, the Higher Education Act provides for accrediting agencies to ensure the quality of education. The recognized accrediting body for LSU is the Southern Association of Colleges and Schools, Inc. (SACS). SACS in turn has promulgated certain rules and regulations. One of these rules, found at section 3.2.6 of SACS' "Principles of Accreditation," provides that **"[t]here is a clear and appropriate distinction, in writing and practice, between the policy-making functions of the governing board and the responsibility of the administration and faculty to administer and implement policy."** See *Auburn, supra*. In light of this recognized and required distinction between the Board's policy-making functions (the Board's liability was previously decided) and the faculty/administration's implementation function (the individual faculty members' and administrators' liability is now before the Court), it is clear that the First Circuit's previous finding has no bearing on the question of the liability of the faculty members and administrators now before the Court. This is not form over substance; it goes directly to the substance of Ms. Thurman's claim and the federal educational laws that give rise to her rights and outline the differing duties and functions of the Board on the one hand and individual faculty members and administrators on the other.

Finally, the law of the case doctrine does not apply because the same parties are not before the Court here. The appeals court disposed of this argument as follows:

> Though the individual defendants were not specifically named as parties to the action at that time, the claims asserted against LSU were based on LSU's actions, through its individual employee defendants, in failing to follow established policy and procedure, or respondeat superior liability. Thus, Ms. Thurman's ability to prove their liability for actions in regard to the same claims, based on the same facts, was previously decided.

(Ruling, p.6). There is no other way to say it: this is simply an incorrect statement of law[1]. It is wrong to say that if one were to sue a restaurant because one of its employees assaulted someone in the parking lot, and the court finds the restaurant is not liable to the assaulted individual, that this ruling forecloses an action against the individual employee who committed the assault, even though the claim against the individual employee arises from the same facts as the claim against the restaurant. The restaurant may not be liable because its employee committed an intentional act that was outside the ambit of his assigned duties or not in furtherance of the restaurant's objectives. See generally, *Baumeister v. Plunkett*, 95-2270 (La. 5/21/96), 673 So.2d 994; *Latullas v. State*, 94-2049 (La.App. 1 Cir. 6/23/95), 658 So.2d 800; *LeBrane v. Lewis*, 292 So.2d 216 (La. 1974).

The same is true here: A ruling that the Board of Supervisors is not liable to Ms. Thurman does not foreclose her pursuit of claims against individual faculty

[1] Even the individual defendants "do not dispute the general legal principle that there are situations in which the employee is liable but the employer is not." (Defendants' brief to First Circuit, p.8).

members and administrators. Ms. Thurman has alleged that the individual faculty members did not exercise professional judgment in connection with her claim and that they were not acting in furtherance of the university's objectives but that they departed significantly from the university's published policies and procedures and essentially sabotaged her academic career.

CONCLUSION

This case has potentially far-reaching implications for LSU's administration and its faculty and students. A ruling in favor of the individual defendants on these facts would essentially write out of existence the "clear and appropriate distinction, in writing and in practice, between the policy-making functions of the governing board and the responsibility of the administration and faculty to administer and implement policy," which is required by Rule 3.2.6 of the Principles of Accreditation of the accrediting agency recognized by the federal government under the Higher Education Act. See *Auburn, supra*. Such a ruling would also create tension between state courts and federal governmental requirements. The distinction required is this: The Board has policy-making functions only; in this case the Board has been granted summary judgment. By contrast, the faculty and administrators have the responsibility of administering and implementing policy. The prior ruling in favor of the Board (regarding policy-making functions) did not dispose of Ms. Thurman's claims against the individual defendants (regarding their responsibility to administer and implement policy). Ms. Thurman has shown genuine issues of material fact as to whether she was denied due process by the individual defendants in the execution of

their administration/implementation responsibilities, as the defendants have departed significantly from LSU policy and academic norms established by federal law and this Court and other federal courts, to an extent that due process has been denied. There was a total absence of professional decision-makers and no deference is due to the individual defendants on these facts.

The First Circuit's ruling conflicts with this Court's decisions and an important decision of a federal district court. It sets aside the *Horowitz* requirement of "careful and deliberate decision making" and *Ewing*'s requirement of "professional decisionmaking" before deference is due to decisions by an institution or its faculty or administration. And it completely ignores the federally required distinction between the policy-making functions of an institution's Board of Supervisors and the administration/implementation functions of individual administrators and faculty members.

For the foregoing reasons, this Court should grant a writ of certiorari in this matter and reverse the rulings of the Louisiana Court of Appeal, First Circuit, and remand this matter to the state district court for further proceedings. Alternatively, this Court should reverse and render judgment in favor of Ms. Thurman, and remand to the state district court for calculation of damages. This Court should clarify the potential impact of the Louisiana courts' decision on all institutions under the authority of the federally appointed accrediting agency, SACS, regarding grading and other procedures; should clarify and reaffirm the definition and application of the term "professional decisionmaker" in this context; and should reaffirm or

clarify the "separation of functions" requirement mandated by the Principles of Accreditation and the *Auburn* decision.

Respectfully submitted,

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NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2004 CA 0891

NORAH THURMAN

VERSUS

BOARD OF SUPERVISORS OF LOUISIANA
STATE UNIVERSITY & AGRICULTURE
& MECHANICAL COLLEGE

Judgment Rendered: [Oct. 26, 2005]

* * *

Opinion Granting Rehearing

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 466,572

Honorable William A. Morvant, Presiding

/s/ JMG
/s/ EJG by JMG
/s/ PMC by JMG

* * *

Scott D. Wilson Baton Rouge, LA	Counsel for Plaintiff/Appellant Norah Thurman
John P. Murrill Baton Rouge, LA	Counsel for Defendants/Appellees John Larkin, Paul Hoffman, Janet Norris, Janna Oetting, Hugh Buckingham, and James West

* * *

BEFORE: GUIDRY, GAIDRY, AND McCLENDON, JJ.

GUIDRY, on rehearing,

In our original opinion, we dismissed Nora [sic] Thurman's appeal, stating that we lacked jurisdiction because the judgment appealed was not final in accordance with La. C.C. art. 1915(B). At the time Ms. Thurman filed her motion for appeal, the judgment at issue was a partial summary judgment in accordance with La. C.C.P. art. 966(E). Therefore, because it lacked a designation of finality as required by La. C.C. P. art. 1915(B), it was not final for purposes of appeal. However, following the filing of the appeal, but before the matter was submitted to this court for decision, the sole remaining claim in Ms. Thurman's case was voluntarily dismissed. This subsequent act presumably cured any jurisdictional defect, making the appealed from judgment final for purposes of appellate review. *See Overmier v. Traylor*, 475 So. 2d 1094 (La. 1985); *see also Succession of Grimmett*, 31,975, p. 6 (La. App. 2nd Cir. 3/5/99), 738 So. 2d 27, 31; *Carroll v. State Farm Fire and Casualty*, 31,652, p. 1 (La. App. 2nd Cir. 8/6/98), 715 So. 2d 771, 772 (stating jurisdictional defect, existing when appeal is taken from uncertified partial final judgment, is cured by subsequent certification or by the rendition of subsequent judgment(s) adjudicating all the claims of all the parties.) Therefore, though this situation does not technically adhere to the requirements of La. C.C. art. 1915, under these particular circumstances, and in an effort to follow the longstanding preference of maintaining appeals, we grant a rehearing in this matter to address the merits. *See Shell Pipeline Corp v. Kennedy*, 00-3207, p. 4 (La. 10/16/01), 799 So. 2d 475, 478; *Burton v. Hinton*, 426 So.2d 192, 193 (La. App. 1st Cir. 1982).

In her appeal, Ms. Thurman argues that the district court erred in granting the individual LSU faculty member defendants' motion for summary judgment and in deciding that the previous granting of summary judgment to LSU foreclosed Ms. Thurman's suit against the individual defendants for due process violations and defamation. However, based upon our de novo review of the record and applicable law, we find no error in the trial court's granting of summary judgment.

As stated in our original opinion, Ms. Thurman was a candidate for her doctoral degree in the Department of Communication Sciences and Disorders at LSU. However, after a series of events involving the review of her dissertation, Ms. Thurman was denied her doctoral degree. On November 15, 1999, Ms. Thurman filed a petition for damages naming the Board of Supervisors of LSU as defendant. In this petition, Ms. Thurman alleged that LSU denied her due process by failing to comply with its written policies regarding composition and qualification of the advisory committee and the amount of assistance provided to Ms. Thurman. Additionally, the petition alleged procedural irregularities in the dissertation review and appeal process. Thereafter, on December 10, 2001, LSU filed a motion for summary judgment. A hearing on the motion was held on January 28, 2002. In her memorandum in opposition to LSU's motion for summary judgment, Ms. Thurman elaborated on her claims, stating that LSU failed to follow its own procedures: in connection with Ms. Thurman's grade appeal, in accusing Ms. Thurman of a breach of academic integrity, in requiring Ms. Thurman to conduct an independent revision of her dissertation, and in directing and approving the use of a flawed design.

Following the hearing on January 28, 2002, the trial court denied LSU's motion for summary judgment. Thereafter, Ms. Thurman amended her petition to add the individual defendants at issue in the instant case. In her petition, Ms. Thurman alleged that the individual defendants violated LSU policy by requiring her to conduct an independent revision, failed to comply with procedural delays in regard to her grade appeal, falsely accused her of a breach of academic integrity, failed to follow procedures for handling allegations of misconduct, were negligent in advising her to use a certain type of statistical analysis, and were negligent in approving the design of her study.

In the interim, LSU sought a writ of supervisory review with this court of the trial court's denial of its motion for summary judgment. On July 15, 2002, this court reversed the trial court's denial and granted LSU's motion for summary judgment, dismissing Ms. Thurman's petition with prejudice. In that opinion, this court stated that "[p]laintiff cannot demonstrate in the case at bar that relator and/or its faculty substantially departed from accepted academic norms and did not exercise professional judgment," and therefore, could not meet her burden of proof. Further, this court held that: Ms. Thurman received the required notice of the school's dissatisfaction with her academic performance and threat of possible dismissal; Ms. Thurman could not demonstrate any prejudice from the alleged failure to follow school procedures in regard to the breach of academic integrity allegation, as that allegation was not the basis upon which her dissertation was failed; and any appeal procedure irregularities were the result of actions taken to accommodate Ms. Thurman. The Louisiana Supreme Court subsequently denied writs of supervisory review.

Thereafter, on May 6, 2003, the individual defendants filed a motion for summary judgment, asserting that a motion for summary judgment had already been granted in favor of LSU and that the factual basis for the claims against LSU are identical to those against the individual defendants and therefore, summary judgment in favor of the individual defendants was appropriate. Following a hearing, the trial court granted the individual defendants' motion for summary judgment.

DISCUSSION

In support of maintaining the trial court's judgment, the individual defendants assert on appeal that this court's prior decision on LSU's supervisory writ application is law of the case and as such, the trial court was correct in finding that there were no genuine issues of material fact and summary judgment was appropriate.

The law of the case principle is a discretionary guide which relates to the rule that an appellate court ordinarily will not reconsider its own rulings of law on a subsequent appeal in the same case. *Louisiana Land and Exploration Co. v. Verdin*, 95-2579, pp. 3-4 (La. App. 1st Cir. 9/27/96), 681 So. 2d 63, 65, *writ denied*, 96-2629 (La. 12/13/96), 692 So. 2d 1067, *cert denied*, 520 U.S. 1212, 117 S. Ct. 1696, 137 L. Ed. 2d 822 (1997). It applies to all prior rulings or decision of an appellate court in the same case, including decisions rendered on supervisory writ applications. *Bertucci v. Lafayette Insurance Co.*, 02-0242, p. 3 (La. App. 4th Cir. 5/21/03), 851 So. 2d 1179, 1182. The reasons for the "law of the case" doctrine are to avoid relitigation of the same issue; to promote consistency of result in the same litigation; and to promote efficiency and fairness to

both parties by affording a single opportunity for the argument and decision of the matter at issue. *Louisiana Land and Exploration Co.*, 95-2579 at p. 4, 681 So. 2d at 65. When an appellate court considers arguments made in supervisory writ applications or responses to such applications, the court's disposition on the issue considered usually becomes the law of the case, foreclosing relitigation of that issue either at the trial court on remand or in the appellate court on a later appeal. However, where a prior disposition is clearly erroneous and will create a grave injustice, it should be reconsidered. *Louisiana Land and Exploration Co.*, 95-2579 at p. 4, 681 So. 2d at 65.

After a thorough review of the record, we find that the issues decided in the prior writ of supervisory review are identical to those sought to be decided in the instant matter, namely, whether established policies and procedures were followed in regard to Ms. Thurman's dissertation review, grade appeal, and academic integrity allegation. A review of the original petition against LSU, the amended petition against the individual defendants, and Ms. Thurman's memoranda in opposition to both motions for summary judgment shows that the claims asserted in both petitions are identical in all pertinent respects and are based, admittedly, on the same facts. Ms. Thurman attempts to characterize the claims against the individual defendants as being different from those asserted in the original petition by referring to the individual defendants' actions as "reckless" or "negligent," particularly in regard to the claims regarding advise and approval of statistical analysis and study design. However, a close reading of these claims, in conjunction with the claims asserted in the original petition, reveals that this argument is merely one of form over substance, as the

substance of the claims are the same – based on the identical facts, the individual defendants failed to follow university policy and procedure.

Further, Ms. Thurman argues that law of the case cannot be applied because the individual defendants were not before this court when our decision granting LSU's writ of supervisory review and motion for summary judgment was rendered. Though the individual defendants were not specifically named as parties to the action at that time, the claims asserted against LSU were based on LSU's actions, through its individual employee defendants, in failing to follow established policy and procedure, or respondeat superior liability. Thus, Ms. Thurman's ability to prove their liability for actions in regard to the same claims, based on the same facts, was previously decided. To not apply law of the case in this situation, when the court is called upon to resolve issues that have been fully presented and decided, would run contrary to the above articulated principles of the law of the case doctrine. *See Bertucci*, 02-0242 at pp. 2-3, 851 So. 2d at 1181 (finding that determination on identical issue in supervisory writ taken by other defendant insurance companies similarly situated in the litigation was law of the case as to two additional named insurance company defendants.) Therefore, we find Ms. Thurman's argument to be without merit, and the trial court was correct in granting the individual defendants' motion for summary judgment based on the prior ruling of this court.

In regard to Ms. Thurman's defamation claim, however, we find that it was raised for the first time in the amended petition naming the individual faculty members as defendants; as such, consideration of this claim is not restricted by the law of the case doctrine. However, we find

from our review of the record that this defamation claim has prescribed.[1] Defamation claims are subject to the one-year prescriptive period applicable to delictual actions pursuant to La. C.C. art. 3492. As such, Ms. Thurman's cause of action for defamation began to run from the date of her knowledge of the letter sent by Department of Communication Sciences and Disorders Chair Paul Hoffman, addressed to her and carbon copying John Larkin, Dean of the Graduate School, and asserting a breach of academic integrity with regard to Ms. Thurman's conduct of her study and its reporting. *See Rice v. Fetterman*, 00-2525, p. 4 (La. App. 1st Cir. 3/28/02), 814 So. 2d 696, 698. This letter was dated January 28, 1998; however, Ms. Thurman did not file her original petition in this matter until November 15, 1999. Therefore, Ms. Thurman filed her defamation claim well outside the one-year prescriptive period and as such, the trial court was correct in granting the individual defendants' motion for summary judgment in regard to this claim as well.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment, granting the individual faculty member defendants' motion for summary judgment. All costs of this appeal are to be borne by the appellant, Nora [sic] Thurman.

AFFIRMED.

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[1] The individual defendants pleaded the objection of prescription in conjunction with their motion for summary judgment, which is a permissible means by which to raise such an objection. *See Scott v. Butler Brothers Furniture Company of Baker, Inc.*, 315 So.2d 809, 810 (La. App. 1st Cir. 1975).

NORAH THURMAN	**NO. 466,572 SECTION XXIII**
v.	**19TH JUDICIAL DISTRICT COURT**
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE	**PARISH OF EAST BATON ROUGE**
	STATE OF LOUISIANA

ORAL REASONS FOR JUDGMENT
MOTION FOR SUMMARY JUDGMENT
MOTION TO STRIKE SECOND AMENDED PETITION
MONDAY, JANUARY 12, 2004
THE HONORABLE WILLIAM A. MORVANT,
JUDGE PRESIDING

Reporter's Note: The motion was argued by counsel.

Ms. Craft: This Court originally denied summary judgment on the basis of the evidence which is before the Court, and I again offer, file and introduce that evidence.

Reporter's Note: The motion was further argued by counsel and submitted.

The Court: I have reviewed and I've got to say it was a rather lengthy record because of the trips y'all have made to the First Circuit, to the Louisiana Supreme Court and the writ application to the United States Supreme Court. As I appreciate it, the matter began back in May of '99, with Ms. Thurman suing the board of supervisors. And as I appreciate the initial pleading, she claims she was improperly denied a Ph.D.; that LSU failed to comply with written policies regarding composition and qualification of the advisory board; the amount of

assistance she received from the advisory board; and numerous procedural irregularities in the dissertation review and in the appeal process; and Ms. Thurman claimed that all of these constituted a denial of due process. December 7, 2001, LSU files, as the only defendant in the case, it's Motion for Summary Judgment and they attach to that summary judgment supporting affidavits. John Larkin, who was the senior associate dean of the grad school; Paul Hoffman, professor and chair of the department of communication sciences and disorders; Janet Norris, a professor in the department of communication sciences and disorders; Hugh Buckingham; Janna Oetting.

Mr. Murrill: Oetting.

The Court: Oetting?

Ms. Craft: Oetting.

The Court: I knew I'd butcher one of those. George Strain; James Wandersee; and Abbas –

Mr. Murrill: Tashakkori.

The Court: It Tashakkori. Hoffman, Norris, Oetting, Buckingham appeared to have been members of plaintiff's advisory committee. Tashakkori and Wandersee were the independent professors appointed to review plaintiff dissertation. The Motion for Summary Judgment that was before Judge McDonald fully set forth the facts and the sequence of events regarding plaintiff's dissertation, the presentations and the reasons for issuing a failing grade. That motion was heard and denied by Judge McDonald February 25, 2002. As counsel noted, LSU took writs to the First Circuit. While it's pending, on March 21, 2002, Judge McDonald granted plaintiff leave of Court to

amend to add Hoffman, Buckingham, Norris, Oetting, West and Larkin, as well as Hoffman, as additional defendants. As I note, Hoffman, Buckingham, Norris, Oetting and West were all members of plaintiff's advisory committee and Larkin was a dean of the grad school. Again, in the supplemental and amending petition, plaintiff alleges that these defendants failed to comply with procedural delays and requirements on appeal; were negligent in advising plaintiff regarding the use of statistical analysis in dissertation; neglegently [sic] approved the design of the study, then criticized it; Hoffman recklessly and falsely accused her of a breach of academic integrity; failed to follow LSU policy and procedure for handling allegations of misconduct in research; and basically set forth the same allegations contained in plaintiff's opposition memoranda to LSU's Motion for Summary Judgment. When I looked at the amending petition and read it in comparison to the memorandum in opposition, those were some of the precise allegations contained in plaintiff's memo. July 15th of 2002, the First Circuit reverses Judge McDonald, grants LSU's Motion for Summary Judgment and dismisses the suit, with prejudice. As counsel has done, I've looked at the opinion of the First Circuit where it specifically stated, and I highlighted, plaintiff cannot demonstrate in the case at bar that relator or its faculty substantially departed from accepted academic norms and did not exercise professional judgment. The Louisiana Supreme Court and U. S. Supreme Court denied writs, then the individual defendants came back and filed a Motion for Summary Judgment. Plaintiff's response to that Motion for Summary Judgment was basically the same argument and almost in the exact sequence as its writ application to the Louisiana Supreme Court, which was Exhibit K, and its writ application to the United States Supreme Court, which was

Exhibit O, and, in fact, even had the same headings as far as its argument. I note at the hearing on the Motion to Strike the amended petition counsel for plaintiff acknowledged that the claim against the individual defendants was the same factual claim as against LSU and further acknowledged that if appellate court reversed the trial court's denial of the Motion for Summary Judgment, then he envisioned that defendants would file a Motion for Summary Judgment which should – and then he said – or, rather, would be granted. And, Ms. Craft, I agree, argument of counsel is not persuasive, but what I find is persuasive is, when the First Circuit addressed LSU's argument, it seemed to take it one step further and said, LSU nor its faculty departed from these academic norms, nor did they fail to exercise professional judgment. Based on the language of the First Circuit in that opinion reversing Judge McDonald, I find that as the matter stood back on July 28th of '03 when this case was before me – was to be before me on a Motion for Summary Judgment there are no issues of genuine material fact and the movers are entitled to judgment as a matter of law. As to the claims that were set forth in plaintiff's initial, amending and supplemental petition, the Court is going to grant the Motion for Summary Judgment as prayed for. That then takes us to the Motion to Strike as to the second amending petition. And as Ms. Craft indicated, and the Court is in agreement, I don't think the Motion for Summary Judgment addresses the allegations contained in this new petition primarily because the second amended petition was filed September 15, 2003, after the hearing,. the proposed hearing, on the Motion for Summary judgment, nothing has changed. I really was hoping that Mr. Wilson was going to be here because I did have a question as to why such an inordinate delay between the November 15,

'99, filing of the original petition and the July 15, 2002, filing – I'm sorry, the March 21, 2002, filing of the amended petition, and then a September 15, 2003, second petition to add age discrimination. The Court granted motion and leave to file the amended petition. And I do realize that some time has passed, actually about four years, since the original petition was filed and the granting of leave of court to file the amending petition. The Court at this time is going to deny the Motion to Strike with the understanding there has been a request by the individual defendants to have time to respond by way of answer or any other response that may be appropriate. I'll grant you 30 days to file responses to the second amending petition with the understanding that the only matter before the Court is going to be the claim of age discrimination which has not been previously addressed by either the First Circuit on the original summary judgment, nor was it actually before the Court today. I don't think it encompassed the Motion for Summary Judgment. So the claims set forth in the second amending petition will be the one remaining claim.

Ms. Craft: Thank you, Your Honor.

The Court: You're welcome.

Mr. Murrill: Thank you, Your Honor.

The Court: I would ask that – Ms. Craft, are you going to be staying in for the long haul or you're just here to argue today?

Ms. Craft: I think I'm just here to argue for the day, Judge.

The Court: All right. What I'm going to do –

Ms. Craft: I'd prefer not to be in for the long haul.

The Court: Mr. Murrill, I'm going to ask that you prepare a judgment in accordance with the Court's ruling, submit same to Mr. Murrill – I mean, Mr. Wilson to review as to form and substance, then, upon presentation, the Court will sign it.

Mr. Murrill: Yes, sir.

Ms. Craft: Thank you, Your Honor.

The Court: Thank you, Your honor.

The Court: You're welcome.

* * *

CERTIFICATE

I, Barbara L. Kearny, Official Court Reporter, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, do hereby certify that the foregoing 6 pages constitute a true and accurate transcript of the matter as taken by me on the stenotype machine, to the best of my knowledge and ability.

Witness my hand, this 21st day of January, 2004.

[SEAL]
OFFICIAL SEAL
BARBARA L. KEARNY
Certified Court Reporter
in and for the
State of Louisiana
Certificate Number 87141
Certificate expires 12-31-04

/s/ Barbara L. Kearny
Barbara L. Kearny
Official Court Reporter
19th Judicial
District Court
CCR No. 87141

NINETEENTH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

NORAH THURMAN	: **NUMBER 466,572**
Plaintiff,	: **SECTION 15**
VERSUS	: (Filed Jan. 23, 2004)
THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL	:
Defendants.	:

ORDER

This matter came before the Court on two motions, both filed by the defendants: a Motion For Summary Judgment and a Motion To Strike the plaintiff's second amended petition. Present in Court was counsel for the plaintiff, Ms. Jill Craft, and counsel for the defendants, Mr. John Murrill. Considering the entire suit record, the memoranda submitted in support of and in opposition to the motions, and the arguments of counsel:

IT IS ORDERED that the defendants' Motion To Strike the plaintiff's second amended petition be and it hereby is DENIED.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment be and it hereby is GRANTED as to all claims asserted by the plaintiff except her claim that she was unlawfully discriminated against on the basis of her age as set forth in her second amended petition. The defendants' motion for summary

judgment was filed prior to the plaintiff's second amended petition and therefore did not address the plaintiff's claim that she was unlawfully discriminated against on the basis of her age; accordingly, the propriety of summary judgment as to the claim of age discrimination was not before the Court.

IT IS FURTHER ORDERED that the individual defendants shall have thirty days to answer the second amended petition.

Baton Rouge, Louisiana, this 27 day of January, 2004.

/s/ William A. Morvant
Judge, Nineteenth Judicial District Court

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2004 CA 0891

NORAH THURMAN

VERSUS

BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY &
AGRICULTURE & MECHANICAL COLLEGE

Judgment Rendered: MAY 6 2005

* * *

/s/ JMG Appealed from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 466,572

Honorable William A. Morvant, Presiding

* * *

Scott D. Wilson Baton Rouge, LA	Counsel for Plaintiff/Appellant Norah Thurman
John P. Murrill Baton Rouge, LA	Counsel for Defendants/Appellees John Larkin, Paul Hoffman, Janet Norris, Janna Oetting, Hugh Buckingham, and James West

* * *

BEFORE: GUIDRY, GAIDRY, AND McCLENDON, JJ.

[/s/ EJG Gaidry, J. concur
/s/ PMc McClendon, J. concurs.]

GUIDRY, J.

In this action, plaintiff, Norah Thurman, appeals the trial court's judgment granting defendants', John Larkin, Paul Hoffman, Janet Norris, Janna Oetting, Hugh Buckingham, and James West, motion for summary judgment. For the reasons that follow, the appeal is dismissed.

Norah Thurman was a candidate for her doctoral degree in the Department of Communication Disorders at Louisiana State University and Agriculture and Mechanical College (LSU). However, after a series of events involving the review of her dissertation, Ms. Thurman was denied her doctoral degree. On November 15, 1999, Ms. Thurman filed a petition for damages, naming the Board of Supervisors of LSU (Board), John Larkin, Paul Hoffman, Janet Norris, Janna Oetting, Hugh Buckingham, and James West as defendants, and alleging irregularities in her dissertation review and appeal process, and that she was improperly denied her doctoral degree. On December 10, 2001, the Board filed a motion for summary judgment, which was ultimately granted.[1]

On May 6, 2003, the remaining defendants also filed a motion for summary judgment. Following the filing of this motion, Ms. Thurman filed an amended petition, asserting claims of age discrimination. The defendants, thereafter, also filed a motion to strike Ms. Thurman's amended petition. Following a hearing on both motions, the trial court signed a judgment on January 27, 2004, denying the

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[1] The trial court denied the Board's motion for summary judgment on January 28, 2002. However, this court, pursuant to a request for supervisory review filed by the Board, granted the motion on July 15, 2002.

defendants' motion to strike and granting the defendants' motion for summary judgment. In particular, the judgment stated: "IT IS FURTHER ORDERED that the defendants' motion for summary judgment be and hereby is GRANTED as to all claims asserted by the plaintiff *except* her claim that she was unlawfully discriminated against on the basis of her age as set forth in her second amended petition." (Emphasis added.)

This court's appellate jurisdiction extends to "final judgments." La. C.C.P. art. 2083. Louisiana Code of Civil Procedure article 1915 authorizes the immediate appeal of final judgments, including partial final judgments, and provides, in pertinent part:

> A. A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:
>
> * * *
>
> (3) Grants a motion for summary judgment, as provided by Articles 966 through 969, but not including a summary judgment granted pursuant to Article 966(E).
>
> B. (1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

> (2) In the absence of such a determination and designation, any order or decision which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties and shall not constitute a final judgment for the purpose of an immediate appeal. Any such order or decision issued may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

The January 27, 2004 judgment, from which Mrs. Thurman appeals, clearly grants a partial summary judgment in accordance with La. C.C.P. art. 966(E).[2] Therefore, in order to be appealable, it must be designated as final, after an express determination by the trial court that there is no just reason for delay. *See* La. C.C.P. art. 1911. However, the judgment contains no such designation. In her motion for appeal, Ms. Thurman acknowledged that the January 27, 2004 judgment was not final and therefore, unappealable. However, she asserted that the sole remaining claim, her discrimination claim, was voluntarily dismissed pursuant to a judgment rendered on January 27, 2004. However, according to the record, Ms. Thurman filed a motion to dismiss the age discrimination claim subsequent to the rendition of the January 27, 2004 judgment. The order dismissing the discrimination claim was not signed until March 16, 2004. Therefore, at the times that the January 27, 2004 judgment was signed and

---

[2] Louisiana Code of Civil Procedure article 966(E) provides that "[a] summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case."

appealed, it was not a final judgment for purposes of immediate appeal, and as such, this court lacks jurisdiction to review the merits of the appeal. Consequently, the appeal is dismissed without prejudice, and all costs of this appeal are to be borne by the appellant, Norah Thurman.

We issue this memorandum opinion in compliance with Uniform Rules-Courts of Appeal, Rule 2-16.1B.

APPEAL DISMISSED.

NOT DESIGNATED
FOR PUBLICATION

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 2004-CA-0891

Norah Thurman

- - Versus - -

The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College

19th Judicial District Court
Case #: 466572
East Baton Rouge Parish

On Application for Rehearing filed 05/17/2005
Rehearing Granted

/s/ John M. Guidry
John M. Guidry

/s/ E. James Gaidry by JMG
E. James Gaidry

Page McClendon

[/s/ McClendon, J. would deny the rehearing by [illegible]]

Filed JUN 21, 2005

/s/ Christine Crow
Christine L. Crow, Clerk

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

NORAH THURMAN NO. 2002 CW 0599

VERSUS

THE BOARD OF SUPERVISORS
OF LOUISIANA STATE
UNIVERSITY AND
AGRICULTURAL AND JUL 15, 2002
MECHANICAL COLLEGE

In re: The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 466,572, Div. "H"

BEFORE: CARTER, WHIPPLE, GUIDRY, DOWNING AND JAMES, JJ.

WRIT GRANTED. The trial court erred in denying relator's motion for summary judgment. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. **Regents of University of Michigan v. Ewing**, 106 S.Ct. 507, 474 U.S. 214, 80 L.Ed.2d 523 (1985). Plaintiff cannot demonstrate in the case at bar that relator and/or its faculty substantially departed from accepted academic norms and did not exercise professional judgment. Moreover, as the Supreme Court held in Board of **Curators of University of Missouri v. Horowitz**, 98 S.Ct. 948, 435 U.S. 78, 55 L.Ed.2d 124 (1978), a student

dismissed for academic reasons is not entitled to a hearing before the decisionmaker, but the student must only receive notice of the school's dissatisfaction with his or her academic performance and with the threat of possible dismissal. In the case at bar, plaintiff received such notice. Regarding plaintiff's claim that relator failed to follow its procedures regarding the allegation of breach of academic integrity, this allegation was not the basis upon which plaintiff's dissertation was failed; therefore, plaintiff cannot demonstrate any prejudice from the alleged failure to follow school procedures. As to plaintiff's complaint that appeal procedures were not followed, in those instances, the actions were to accommodate plaintiff. Therefore, the writ is granted, the judgment of the trial court denying the motion for summary judgment is reversed, the motion for summary judgment is granted, and judgment is entered in relator's favor, dismissing plaintiff's petition with prejudice.

ACJ
BJC
VGW
RDD

Guidry, J., dissents and would deny the writ.

COURT OF APPEAL, FIRST CIRCUIT

/s/ Elizabeth D. Nauta
DEPUTY CLERK OF COURT
FOR THE COURT

Judge A. Clayton James is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

The Supreme Court of the State of Louisiana

NORAH THURMAN

VS. NO. 2005-C-2342

BOARD OF SUPERVISORS
OF LOUISIANA STATE
UNIVERSITY &
AGRICULTURE &
MECHANICAL COLLEGE

IN RE: Thurman, Norah; – Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. E, Nos. 466,572; to the Court of Appeal, First Circuit, No. 2004 CA 0891

March 17, 2006

Denied

JLW
PFC
BJJ
JPV
CDT
JTK

Supreme Court of Louisiana
March 17, 2006

/s/ Rai L. Daigle
Deputy Clerk of Court
For the Court

OPPOSITION BRIEF

(3)

No. 05-1529

FILED
JUN 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

NORAH THURMAN,

Petitioner,

versus

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Facts

The Petitioner, seeking a doctoral degree in communication disorders, enrolled in the LSU Graduate School in the Fall 1991 semester. At all relevant times, her major professor was Respondent Paul Hoffman, the chair of the Department of Communication Sciences and Disorders. The other members of her graduate advisory committee were Respondents Jan Norris, Janna Oetting, and Hugh Buckingham, who were all professors in the same department. A fifth committee member, Respondent Jim West, was appointed from an outside academic department as required by the Graduate School Handbook.

Doctoral students at LSU have seven years in which to complete the program; if they fail to complete their degree requirements within seven years, the Graduate School has the discretionary power to extend additional time.

As is typical of doctoral students, Thurman spent the first several years of her program taking graduate level courses in a traditional classroom setting, then spent the remainder of her program researching and writing her dissertation. While preparing her dissertation, she typically met with Hoffman, her major professor, once a month. Thurman would submit drafts of her dissertation to Hoffman, who would then edit the submissions and propose areas for further research.

In the Spring 1997 semester, Thurman took her final examination, which consisted of an oral defense of her dissertation before her graduate advisory committee. The committee members unanimously agreed that she did not

deserve a passing grade. They noted numerous substantive problems with the written dissertation itself; even more troubling, Thurman did not appear to completely understand her own project, and she was unable to satisfactorily explain or defend the literature, the methods, the statistics, or the results of her research. The committee was thus concerned that Thurman had relied too heavily on her major professor and had not demonstrated the ability to do independent research and writing. However, despite their reservations, the committee gave her another chance to obtain her degree by allowing her the opportunity to revise the paper. To demonstrate that she was capable of working independently, Thurman was instructed to revise the document using only the written and oral feedback given to her at the final exam, without any additional consultation with Hoffman or the other committee members. She would then be allowed to resubmit the dissertation in the Fall 1997 semester. In light of her poor performance at the final examination, Thurman received a grade of "U" (unsatisfactory) for the Spring 1997 semester.

Ms. Thurman submitted the revised dissertation in October 1997. With the approach of the holiday season and undergraduate exams, Hoffman was unable to convene a meeting of Thurman's committee prior to the end of the semester. Thurman was given a grade of "S" (satisfactory) for the Fall 1997 semester.

The committee met in January 1998 to evaluate the revised dissertation. The committee members believed that the paper still contained numerous substantive problems; surprisingly, they also noted that Thurman had ignored much of the specific feedback given to her at the oral defense in February 1997. The committee therefore

unanimously voted to fail the revision and to assign a grade of "U" for the Spring 1998 semester.

According to the LSU Graduate School Handbook, a student who receives a second grade of "U" is subject to being dropped from the Graduate School. Because Thurman had now received two "U's," she was notified at the conclusion of the Spring 1998 semester that she was being dropped from the Graduate School.

Petitioner appealed the "U" she received for the Spring 1998 semester to Respondent John Larkin, the Senior Associate Dean of the Graduate School. During the appeal process, Thurman complained (mistakenly) that her committee members might not understand her research, that her dissertation involved a specialized subject matter with which her committee members might not be familiar. Thurman also complained that her committee was never going to pass her dissertation, having twice rejected the paper already. In response, Larkin asked whether Thurman believed there were any other faculty members at LSU who might be able to fairly evaluate her dissertation. Thurman identified two other LSU professors: Abbas Tashakkori and Jim Wandersee.

In December 1998, Larkin granted Thurman's appeal and changed her grade for the Spring 1998 semester from a "U" to an "S." Larkin based his decision on Thurman's complaint that her committee might not fully understand the supposedly specialized subject matter of her research. Larkin told Thurman that she would be allowed to informally submit her dissertation to Professors Tashakkori and Wandersee, who would critique her paper. Afterward, she could revise the paper as she felt appropriate and formally resubmit it for grading in the Spring 1999 semester. In

response to Thurman's complaint that her original graduate committee would never pass her dissertation, Larkin agreed to form a new committee to whom she could submit her paper.

Tashakkori and Wandersee reviewed Ms. Thurman's dissertation in early 1999. Like Thurman's original committee, both men felt the document contained numerous substantive flaws, many of which were fatal. They each wrote detailed memos to Larkin expressing their specific concerns in February 1999, and Larkin forwarded the memos to Thurman for her consideration.

On March 14, 1999, Thurman wrote Dean Larkin and proposed that she make certain of the revisions suggested by Tashakkori and Wandersee. She also requested that Larkin "make a decision as to whether the proposed revision of this document will be acceptable." As she candidly acknowledged in her deposition, Thurman was now changing her tactic; instead of having her dissertation approved by a graduate committee like every other student who receives a Ph.D. from LSU, she was now proposing that Dean Larkin, a man with no training whatsoever in communication sciences and disorders, evaluate the dissertation on its merits and assign an appropriate grade. Furthermore, she was proposing that Larkin *tell her in advance* whether "the proposed revision . . . will be acceptable." Larkin declined the invitation.

On April 13, 1999, Thurman wrote to Chancellor William Jenkins and threatened to file a lawsuit. In response, LSU notified Thurman that because she had now passed her seven-year deadline in the program without submitting an acceptable dissertation, she would receive yet another grade of "U." This "U," officially her

second (after her "U" in the Spring 1998 semester was reversed on her appeal) would normally have resulted in her being dropped from the Graduate School. However, LSU informed Thurman that it would consider her April 13 letter to Jenkins as an appeal (even though she had not designated the letter as such), thus preserving for Thurman the ability to challenge the grade and remain in the Graduate School.

Thurman chose not to appeal and reiterated her demand that she be awarded her degree. LSU again rejected the demand and reminded Thurman that her seven years in the program had expired. LSU informed Petitioner, however, that it would grant her an extension of time and allow her to remain in the doctoral program and pursue her degree, but that she would still be required to submit the dissertation for review to a committee.

Thurman rejected this final overture from LSU. She never did submit a revised copy of her dissertation during the Spring 1999 semester. In November 1999, she filed this lawsuit against LSU. She claims she was denied due process while a graduate student.

B. Procedural History

Originally, Thurman only named LSU as a defendant in the lawsuit. In December 2001, LSU filed a motion for summary judgment as to all claims. After a hearing on January 28, 2002, the trial court denied the motion.

LSU subsequently filed an application for a supervisory writ of review with the Louisiana Court of Appeal for the First Circuit. On July 15, 2002, the First Circuit granted the writ, reversed the trial court, and entered

judgment in LSU's favor dismissing all claims against it. Thurman filed an application for supervisory review with the Supreme Court of Louisiana, which denied her application in November 2002. She then filed a petition for writ of certiorari with this Court, which denied the petition in March 2003.

While LSU's writ application was pending at the First Circuit, Thurman filed a supplemental petition in the trial court naming individuals John Larkin, Paul Hoffman, Jan Norris, Hugh Buckingham, Janna Oetting, and James West as additional defendants. She asserted precisely the same claims against the individual defendants as she had previously asserted against LSU. Because the individuals were named as defendants only after LSU had filed its motion for summary judgment and subsequent writ application, the decision of the First Circuit to grant summary judgment in favor of LSU did not affect the claims against the individual defendants.

In May 2003, the individual defendants – the Respondents – filed a motion for summary judgment in the trial court. The Respondents argued that the legal claims and factual allegations asserted against them were the same as previously asserted against LSU; furthermore, Ms. Thurman had failed to articulate any reason why the conduct of the individual defendants should be disassociated from the University. Therefore, they too were entitled to judgment as a matter of law. The Respondents also pointed out at the hearing that it was the law of the case as established by the First Circuit that Thurman could not carry her burden of proof against the individual defendants.

After a hearing on January 12, 2004, the trial court granted the motion for summary judgment filed by the individual defendants. The ruling was memorialized in a written order dated January 27, 2004. Ms. Thurman appealed the summary judgment to the Louisiana Court of Appeal for the First Circuit. The First Circuit originally dismissed the appeal for procedural reasons; however, the First Circuit subsequently granted a rehearing to address the appeal on its merits. In a written opinion dated October 26, 2005, the First Circuit affirmed the trial court in its entirety. Thurman filed an application for supervisory review with the Supreme Court of Louisiana, which denied the application on March 17, 2006.

SUMMARY OF ARGUMENT

A. There Are No Compelling Reasons To Grant The Petition

In the arguments contained in her Petition, Ms. Thurman relies on the same two cases that were relied upon by the Louisiana Court of Appeal for the First Circuit in granting the motions for summary judgment. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). In other words, Ms. Thurman agrees that the First Circuit properly stated the controlling rule of law, she simply argues that the First Circuit misapplied the law. She has failed to state a compelling reason for this Court to grant her Petition.

B. The Due Process Issue

Norah Thurman received far more process than what is due under the Constitution. Regarding her substantive due process claim, the decisions made by the Respondents

were entirely consistent with accepted academic norms. Regarding her procedural due process claim, Ms. Thurman received multiple notices of LSU's dissatisfaction with her academic performance and of the threat of her possible dismissal; additionally, she was granted an actual face-to-face meeting with the administrator who was to make the final decision on her appeal. Finally, regarding her academic integrity claim, the claim had prescribed prior to the commencement of this litigation, and Thurman failed to introduce any evidence into the record to support her allegations.

C. The Law Of The Case Issue

The Due Process Clause requires only that Ms. Thurman receive notice and an opportunity to be heard. She received notice of the motion for summary judgment filed by the Respondents, she filed a written memorandum in opposition to the motion, and her attorney was present in court at the hearing and presented oral arguments in opposition to the motion. Accordingly, she received due process from the Louisiana court system. Her complaint that she was denied due process because the Louisiana Court of Appeal for the First Circuit misapplied Louisiana's law of the case doctrine is without merit.

THERE ARE NO COMPELLING REASONS TO GRANT THE PETITION

Rule 10 of the Supreme Court of the United States says that a petition for a writ of certiorari is only granted for compelling reasons, and that "a petition for a writ of certiorari is rarely granted when the asserted error consists of

erroneous factual findings or the misapplication of a properly stated rule of law."

The Louisiana First Circuit relied on *Ewing* and *Horowitz* to resolve the issues raised by this lawsuit. (Pet. at app. 23.) In her Petition to this Court, Ms. Thurman also cites *Ewing* and *Horowitz* as controlling, and much of her Petition is devoted to her argument that *Ewing* and *Horowitz* compel a different result than that reached by the First Circuit. In other words, Thurman agrees that the First Circuit properly stated the controlling rule of law, she simply believes the First Circuit misapplied that law.

She has failed to state a compelling reason to grant her Petition.

ARGUMENT: THE DUE PROCESS ISSUE

A. Due Process And The Independent Revision

Thurman claims she was denied substantive due process in the Spring 1997 semester because she was required to revise her dissertation without assistance from her major professor and committee. Her burden is to show that the committee members' decision to require the independent revision was such a substantial departure from accepted academic norms that they could not have exercised professional judgment. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). However, the undisputed evidence compels precisely the opposite conclusion. The committee believed, based on the widespread problems with the written dissertation itself and on Thurman's inability to explain or defend her own research, that she had not demonstrated the ability to work independently.

They exercised their professional academic judgment to formulate a response – the independent revision – that was specifically tailored to address their concern.[1]

In her Petition, Thurman suggests she was left to grope her way through the revision without any guidance whatsoever. Her characterization is not only incorrect, it is inconsistent with her own deposition testimony. As she acknowledged in her deposition, her committee gave her significant feedback at the oral defense to guide her during the re-write period.

Thurman also complains that the independent revision was contrary to the Graduate Bulletin, which states that "during the entire period of work toward the doctorate, a student's program is directed by a special advisory committee." However, the committee's concern was that Thurman had relied too heavily on her major professor and committee, and that she had completely failed to demonstrate the ability to do independent research and writing. The committee responded by narrowly tailoring a specific response to address a perceived academic deficiency. Furthermore, Thurman neglects to quote another provision from the Graduate Bulletin: "Satisfaction of the minimum requirements of the Graduate School, as stipulated in this bulletin, in no way relieves a doctoral student of responsibility for satisfying any additional requirements

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[1] In her Petition, Thurman emphasizes that John Larkin, Paul Hoffman, and Jim West all testified that they had never previously required a student to conduct an independent revision. However, the issue is whether Thurman's committee exercised its professional judgment, not whether these faculty members had previously encountered a similar situation. As Larkin noted in his deposition: "That's not common as far as I know, but it is certainly within the rights of the department to do that."

deemed appropriate by the graduate faculty of the degree programs in which he or she is enrolled." In other words, the Bulletin specifically contemplates that more particularized requirements may be imposed on students to ensure they are deserving of the degree.

As noted in the Graduate Bulletin:

> [The doctoral degree] is conferred only for work of distinction in which the student displays decided powers of original scholarship and only in recognition of marked ability and achievement. . . . A [doctoral] student must prove ability to complete a significant program of original research by preparing a dissertation embodying creative scholarship. . . .

Thurman's advisory committee was concerned that she had not displayed "powers of original scholarship" or "marked ability and achievement," had not shown the ability to complete a program of "original research," and had not prepared a dissertation embodying "creative scholarship." They exercised their professional academic judgment to craft a response designed to test whether Thurman could display the powers of original and creative scholarship necessary to obtain a Ph.D.

B. Due Process And The Academic Integrity Issue

Thurman's revised dissertation, which she submitted in the Spring 1998 semester, described a subtly different methodology for her research than was described in the original paper. When Ms. Thurman's committee reviewed the revised dissertation, they became concerned that she had apparently committed a breach of academic integrity

by altering the description of the methodology. Thurman now claims that LSU denied her due process by failing to comply with the procedures defined in PS-69, a University policy statement regarding allegations of research misconduct.

Respondents' response is four-fold.

First, Thurman admitted in her deposition that she herself was responsible for the committee's concern, that when she revised her dissertation she inadvertently omitted a key explanatory sentence from the methodology section. Second, Thurman's argument regarding PS-69 is wholly unsupported by the state court record and is nothing more than the argument of her attorney, as she did not introduce PS-69 into evidence, nor did she introduce any affidavits regarding the contents of PS-69. Third, as expressly noted by the Louisiana Court of Appeal for the First Circuit, the committee raised the academic integrity issue in a letter to Thurman dated January 28, 1998, yet Thurman did not file this lawsuit until November 15, 1999; accordingly, her claim prescribed under Louisiana's one-year prescription period prior to the commencement of this action. Finally, it is undisputed that LSU subsequently granted Thurman's appeal and changed her grade for the Spring 1998 semester to "Satisfactory," and thus LSU remedied any alleged harm.[2]

---

[2] Attempting to create an issue of fact where none exists, Thurman portrays the committee's decision in January 1998 to fail her revised dissertation as a sinister event. She says that "no one knows the date of this alleged meeting," she refers to the "alleged" vote to fail her revised dissertation, and she says that "there are no records or notes of this meeting." (Pet. at 5.)

(Continued on following page)

C. Due Process And Thurman's First Appeal

Thurman clams that Respondents denied her due process when they failed to resolve her 1998 appeal within thirty days as required by PS-48, a University policy statement regarding student appeals. In support, she selectively lifts a quote from a letter from Dean Larkin in which he stated he would be unable to respond within thirty days. (Pet. at 6.) Thurman fails to quote the rest of the letter, however, in which Larkin stated that he needed more time because Thurman herself had been so tardy in responding to Larkin's inquiries. The Louisiana Court of Appeal for the First Circuit expressly resolved this issue in Respondents' favor: "As to plaintiff's complaint that appeal procedures were not followed, in those instances, the actions were to accommodate plaintiff." (Pet. at app. 24.)

D. Due Process And The Spring 1999 Semester

In her Petition, Thurman alleges that Dean Larkin refused to appoint a new committee for her during the Spring 1999 semester. She claims she was denied due process because without a committee, there was no place for her to submit her dissertation for review.

These statements are false, and Thurman knows they are false. LSU produced the signed and dated examination card from this meeting more than six years ago, on April 5, 2000. The card was signed by all members of Thurman's committee, and each of them indicated in writing their vote to fail the dissertation. The card was also signed and approved by Dean Larkin on January 29, 1998, the day after the meeting. Thurman has acknowledged on several occasions during the course of this litigation that she received the examination card when it was produced, yet she continues to make these false allegations.

This argument ignores the undisputed fact that Thurman herself halted the committee process. On March 14, 1999, Thurman wrote Dean Larkin and proposed that she make certain of the revisions suggested by Tashakkori and Wandersee. She also requested that Larkin "make a decision as to whether the proposed revision of this document will be acceptable." As she candidly acknowledged in her deposition, Thurman was now changing her tactic; instead of having her dissertation approved by a graduate committee like every other student who receives a Ph.D. from LSU, she was now proposing that Dean Larkin, a man with no training whatsoever in communication sciences and disorders, evaluate the dissertation on its merits and assign an appropriate grade. Furthermore, she was proposing that Larkin *tell her in advance* whether "the proposed revision . . . will be acceptable."

> Q: So you're now proposing to [Larkin] that at this point you simply bypass any further action with any committee, and just you, Larkin, make a decision; is that correct?
>
> A: And also to make a decision on – that was part of it, yes, the original appeal, to make a decision on this proposed revision.

(Depo. at 271.)

Dean Larkin appropriately declined the invitation.

On April 13, 1999, Thurman's attorney wrote to Chancellor William Jenkins and threatened to file a lawsuit. In response, LSU attorneys wrote a letter on May 11 reiterating that Thurman's dissertation must be reviewed by a faculty committee. That same letter noted that because Thurman had not submitted an acceptable

dissertation during the Spring 1999 semester, she would receive yet another grade of "U." This "U," officially her second (after her "U" in the Spring 1998 semester was reversed on her appeal) would normally have resulted in her being dropped from the Graduate School. However, LSU offered to consider her April 13 letter to Jenkins as an appeal, even though she had not designated the letter as such. LSU made this offer to Thurman to preserve her ability to challenge the grade, remain in the Graduate School, and submit her dissertation to a committee.

Thurman's attorney responded on May 24 by stating that "Ms. Thurman is not interested in submitting names for a new committee," that "we request that Ms. Thurman be awarded her degree in August," and that "this matter will not be 'returned to the academic arena.'"

Thus, it was Ms. Thurman herself who halted the committee process, and she cannot now be heard to complain that she was denied due process because she had no advisory committee.

Thurman also argues that the grade of "U" she received for the Spring 1999 semester was not assigned by a "professional decisionmaker." (Pet. at 18.) But she was given a grade of "U" because she spent the remainder of the Spring 1999 semester trying to circumvent the committee requirement. By failing to submit a new version of her dissertation for grading that spring, she failed to comply with the terms of her 1998 appeal and received a grade of "U." LSU offered to treat Thurman's April 13 letter as an appeal so that she could remain in the program and have her dissertation reviewed by a committee, but she rejected the offer and simply demanded that she be awarded her degree.

E. Thurman Received Procedural Due Process

A student dismissed for academic reasons is not entitled to a hearing before the decision-maker; instead, it is only necessary that the student receive notice of the school's dissatisfaction with his or her academic performance and the threat of possible dismissal. *Board of Curators v. Horowitz*, 435 U.S. 78 (1978).

Norah Thurman received far more process than required by *Horowitz*. LSU provided her with notice of its dissatisfaction with her academic performance on multiple occasions, including significant oral and written criticisms from her advisory committee at her final examination in January 1997; written notification in May 1997 that she had received a grade of "U" for the Spring 1997 semester; written criticism from her committee after she submitted her revised dissertation in the Spring 1998 semester; written notification in May 1998 that she had received a grade of "U" for the Spring 1998 semester; and written criticisms of her dissertation from Drs. Tashakkori and Wandersee.

Additionally, the LSU Graduate Bulletin, which is the handbook for graduate study at LSU and which is available to all students, expressly states that a student receiving a second grade of "U" may be dropped from the graduate school. Ms. Thurman was also expressly notified in writing in May 1997, after she received her first grade of "U," that a second grade of "U" would result in her dismissal from the program.

During the course of her 1998 appeal, Petitioner was granted a face-to-face hearing with John Larkin, the Senior Associate Dean of the Graduate School, in December 1998.

Thus, not only did LSU notify Thurman on numerous occasions of her poor academic performance and the threat of her possible dismissal, LSU went even further and granted her an actual face-to-face meeting with the administrator who was to make the final decision on her appeal.

Finally, after Thurman's appeal was granted, LSU took the extraordinary step of allowing her to send her dissertation to two "outside" professors, Tashakkori and Wandersee, for additional feedback.

Norah Thurman received far more procedural due process than is required by the Constitution.

ARGUMENT: THE LAW OF THE CASE ISSUE

When it affirmed the summary judgment in favor of the individual defendants in 2005, the Louisiana Court of Appeal for the First Circuit relied on Louisiana's law of the case doctrine, which is a jurisprudential rule of efficiency established by Louisiana courts to avoid relitigation of the same issues in the same lawsuit. The First Circuit noted it had previously adjudicated precisely the same factual allegations and legal claims when it granted summary judgment in favor of LSU in 2002. Because Thurman had not articulated any meaningful reason why the claims against the individual defendants should be analyzed any differently, the First Circuit invoked the law of the case doctrine to affirm summary judgment in favor of the individual defendants.

Ms. Thurman argues that the First Circuit erred when it applied the law of the case doctrine, "thereby compounding the denial of due process to Ms. Thurman."

(Pet. at i.) She claims that she has had "no opportunity for argument and decision" on her claims against the individual defendants. (Pet. at 21.)

The Due Process Clause only requires that litigants be given notice and an opportunity for a hearing appropriate to the nature of the case. *Boddie v. Connecticut*, 401 U.S. 371 (1970); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). In the present case, the individual defendants filed a motion for summary judgment in May 2003. The trial court set the motion for hearing on January 12, 2004. Ms. Thurman received notice of the motion and the hearing; she filed an opposition memorandum in advance of the hearing setting forth her arguments why summary judgment was inappropriate, and her attorney was present in court at the hearing and presented oral arguments in opposition to the motion.

After the trial court granted the motion for summary judgment filed by the individual defendants, Ms. Thurman appealed the decision to the Louisiana Court of Appeal for the First Circuit. She did not request oral arguments on her appeal, but she did submit a lengthy written brief in support of her appeal.

Ms. Thurman may be unhappy that the motion for summary judgment was granted, and she may believe it was inappropriate for the trial court and the First Circuit to rely in part on Louisiana's law of the case doctrine, but it is undeniable that she received the minimal protections guaranteed by the Due Process Clause: notice and an opportunity to be heard.

Furthermore, the First Circuit did not simply invoke the law of the case doctrine in conclusory fashion. Instead, that court analyzed the claims at length and in detail to

demonstrate that the claims against LSU were identical to the claims against the individual faculty members. (A copy of the complete First Circuit decision is included in the appendix to the Petition.) As the First Circuit concluded:

> After a thorough review of the record, we find that the issues decided in the prior writ of supervisory review are identical to those sought to be decided in the instant matter, namely, whether established policies and procedures were followed in regard to Ms. Thurman's dissertation review, grade appeal, and academic integrity allegation. A review of the original petition against LSU, the amended petition against the individual defendants, and Ms. Thurman's memoranda in opposition to both motions for summary judgment shows that the claims asserted in both petitions are identical in all pertinent respects and are based, admittedly, on the same facts.

(Pet. at app. 6.)

Finally, it is worth noting that Ms. Thurman previously and unsuccessfully made this same argument to the Supreme Court of Louisiana. After the First Circuit ruled on her appeal but before filing her Petition in this Court, Ms. Thurman filed a supervisory writ application with the Louisiana Supreme Court. In her application, she made the same argument that the First Circuit misapplied Louisiana's law of the case doctrine. The Louisiana Supreme Court denied her application, suggesting that Louisiana's highest court found no error with the application of the state law doctrine.

CONCLUSION

Norah Thurman was extended numerous opportunities to obtain her degree and was treated at all times in a manner entirely consistent with the requirements of the Due Process Clause. Notwithstanding these numerous opportunities, she never submitted a dissertation deserving of a doctoral degree. Respondents are entitled to judgment as a matter of law and respectfully request that this Honorable Court deny the petition for writ of certiorari.

By Attorneys,

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No. 05-1529

In The

Supreme Court of the United States

NORAH THURMAN,

Petitioner,

v.

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,

Respondents.

On Petition For A Writ Of Certiorari To The State Of Louisiana Court Of Appeal, First Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. Rule 10 Does Not Suggest That Granting Ms. Thurman's Petition Is Inappropriate.

In their opposition brief, the defendants argue that there is no compelling reason to grant Ms. Thurman's petition, relying on Rule 10's statement that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Defendants incorrectly state that Ms. Thurman's petition asserts merely the misapplication of a properly stated rule of law. The defendants' overly simplistic analysis runs like this: The court below relied on this Court's rulings in *Ewing* and *Horowitz*; Ms. Thurman cites *Ewing* and *Horowitz*; therefore, Ms. Thurman "agrees that the First Circuit properly stated the controlling rule of law, she simply believes the First Circuit misapplied that law." Nothing could be further from the truth. The fact that the court below cited or even discussed the correct cases does not necessarily mean that the court below properly stated the rules of law set forth therein.

Ms. Thurman very clearly argues that the First Circuit failed to properly state the rule of law set forth in *Horowitz*. On page 12 of her petition, Ms. Thurman asserts that the First Circuit improperly stated the test of *Horowitz*, by omitting "an integral part of the equation." This is an argument that the court below failed to properly state the controlling rule of law– not that the court merely misapplied a properly stated rule of law.

Similarly, at pages 15-16 of her petition, Ms. Thurman argues that the First Circuit failed to properly state the rule of law set forth in *Ewing*, by leaving out the finding

that triggers the application of *Ewing's* standard of deference to an academic decision. At page 15, Ms. Thurman expressly states, "Again, as with *Horowitz*, the First Circuit's previous ruling cites and relies on an incomplete version of this Court's holding." With regard to both *Ewing* and *Horowitz*, Ms. Thurman argues that the court below misstated the controlling rule of law– not that the court misapplied a properly stated rule of law.

In addition, Ms. Thurman argues that the *Ewing* ruling incorporates the definition of a "professional" as set forth in *Youngberg v. Romeo*, 457 U.S. 307 (1982), and that the court below failed to properly state the controlling rule of law by not taking into account this definition.

Finally, with regard to the "law of the case" doctrine, Ms. Thurman's petition could not be more clear. On page 23 of her petition, she quotes a passage from the ruling of the court below and then states, "There is no other way to say it: this is simply an incorrect statement of law." The defendants' argument that Ms. Thurman argues only that the court below misapplied properly stated rules of law is clearly incorrect.

II. Factual Issues Surrounding the Alleged January 1998 Meeting.

The defendants allege that Ms. Thurman's committee met in January 1998 to fail her revised dissertation. This is the meeting during which the committee was to have followed *Horowitz* and *Ewing* in affording Ms. Thurman due process. Ms. Thurman has stated that "no one knows the date of the alleged meeting" and that "there are no records or notes of this meeting." Defendants say, "These

statements are false, and Thurman knows they are false." (Opp. Brief, footnote 2).

Regarding the date of the alleged meeting, the defendants here state that the meeting was held on January 28, 1998, but there is no support in the record for this proposition. In fact, Hoffman (the committee chair) could testify only that the meeting "would have been within a few days" of his January 28 letter to Ms. Thurman. The examination card is dated January 29. No one has testified by deposition or affidavit to a definitive date of the alleged meeting.

Regarding the lack of any records or notes of the meeting, the fact is that Hoffman testified that he did not make any notes during the meeting that he kept. No one has testified by deposition or affidavit that there are any records or notes of the meeting, nor have any been produced, other than the unhelpful examination card, which tells nothing about when the meeting took place, where it took place, who was present, or what was discussed. We know only that Ms. Thurman was not present in the meeting to defend her work product.

Ms. Thurman stands by her statements regarding the alleged January 1998 meeting, and is dismayed that the defendants continue to refer to them as "false allegations."

III. Law of the Case.

The defendants elected not to address Ms. Thurman's arguments regarding the inapplicability of the "law of the case" doctrine in this situation, choosing instead to cite old decisions regarding "due process" and to note that the court below ruled in their favor. There really is no legal support for the application of "law of the case" under these

circumstances; presumably if there were the defendants would have cited and discussed it. The court below simply got it wrong. The defendants' half-hearted argument on this point betrays the weakness of the lower court's ruling.

CONCLUSION

For the reasons set forth herein and in Ms. Thurman's original petition, this Court should grant the writ and reverse the lower court rulings.

Respectfully submitted,

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